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PART VI.

EXPORTATION OF ARMS AND MUNITIONS OF WAR

(Continuation of correspondence printed in Special Supplement, July, 1915, pp. 125-129, 146, 166-172.)

Austro-Hungarian Minister for Foreign Affairs to Ambassador Penfield.

No. 88855.]

IMPERIAL AND ROYAL
MINISTRY OF FOREIGN AFFAIRS,
Vienna, September 24, 1915.

The undersigned had the honor of receiving the much esteemed note of August 16 of this year, No. 2758, in which His Excellency the Ambassador Extraordinary and Plenipotentiary of the United States of America, Mr. Frederic Courtland Penfield, was good enough to define the position taken by the Government of the United States with respect to the standpoint represented by the Imperial and Royal Government in the question of the delivery of war requisites to Great Britain and her allies.

The representations which the Washington Cabinet have devoted to this question disclose the various points of view which are controlling for the Government of the United States in this matter, and which according to their opinion prevent them from accommodating themselves to the views of the Imperial and Royal Government. Much as the Imperial and Royal Government have endeavored to thoroughly examine the points which were presented as pertinent by the Washington Cabinet, the most careful weighing and evaluation thereof can not induce them to deviate from the standpoint set forth in their note of June 29 of this year, No. 59465.

The arguments of the Government of the Union are for a great part based upon the incorrect assumption that the Imperial and Royal Government had in any way contested the right which Article 7 of the Seventh and Thirteenth Hague Conventions accords to the subjects of neutral powers to supply belligerents with contraband, whereas the

above-mentioned note of the Imperial and Royal Government expressly stated that the text—but only the text—of the provision referred to affords the Government of the Union with a formal pretext for tolerating the traffic in munitions of war in which its citizens are at present engaged. It is a matter of course that the Imperial and Royal Government did not remotely expect a deviation from an effective treaty on the part of the Washington Cabinet; they merely pointed out that, according to their opinion, that provision should not be interpreted in a manner which would be at variance with the fundamental conception and the highest principles of the law of neutrality. It is true that from the progressive codification of international law there arises the danger that the principles of law laid down in written agreements be regarded as the essence of international law and in this way its most general fundamental conceptions, in so far as they have not been expressly fixed in state treaties, be overlooked.

However, this possibility should be prevented with particular reference to matters of the law of neutrality, and in this sense it appears to be emphasized in the preamble to the Thirteenth Hague Convention (paragraphs 2 and 3) that the stipulations of this convention represent only fragments, which can not cover all circumstances which may arise in practice and which find their corrective and supplement in the general principles of international law.

The Imperial and Royal Government then focused their statement in this matter upon the special problem of whether the cited treaty provision does not find its limitation in these principles; and in appealing to the opinion of science in their affirmation of the question they had in mind and could only have had in mind those authorities which inquire especially whether the otherwise permissible exportation of war requisites does not under certain circumstances involve a compromise of neutrality. In no place in the note of June 29 of this year is an assertion to be found to the effect that writers are unanimously of the view that the exportation of contraband is contrary to neutrality.

Further, the Imperial and Royal Government have in no way advocated a principle of "equalization." As a matter of fact they did not base their suggestion in the question of the exportation of war requisites upon the fact that they are not themselves in a position to draw munitions of war from the United States of America; they are indeed of the opinion that the excessive exportation of war requisites would not be permissible even if it were taking place to the countries of both bellig-

erent parties. It has never occurred to the Imperial and Royal Government that it is obligatory upon a neutral Power to equalize the disadvantage at which Austria-Hungary finds itself in not being able to draw munitions of war from the neutral territory by forbidding its subjects traffic in such objects with the enemies of the Monarchy. They only objected that the economic life of the United States had been made serviceable to the greatest extent by the creation of new and the enlargement of existing concerns for the manufacture and exportation of war requisites and thus, so to say, been militarized, if it be permitted to use here this much misused word.

But in the concentration of so many forces to the one end, the delivery of war requisites, which, although not so intended, actually result in an effective support of one of the belligerent parties, which appears all the more surprising when such articles as are not even contraband are not being supplied from the United States to the other belligerent party, lies a "*fait nouveau*," which weakens reference to supposed precedents in other wars. The parallel with former wars fails particularly as these were always wars between two individual Powers or wars between groups constituted of fewer Powers. Under this condition it was possible that if war supplies were delivered from a neutral country to only one belligerent party, the opponent could turn to other neutrals. But in the present war the United States is the only Power which can be reasonably considered in connection with such deliveries. For this reason the exportation of war requisites from the Union, as it is now being carried on, acquires quite another significance than that which the exportation of contraband could ever before have had. As all of these decisive points appeared in their full import only during the course of the war, the Austro-Hungarian Government consider themselves justified in the view that, in the sense of the last paragraph of the preamble to the Thirteenth Hague Convention, these points contain sufficient grounds for changing the practice hitherto adhered to by the United States. Complete and strict impartiality, such as is being aimed at by the Washington Cabinet, and thus abstention from every direct or indirect support or assistance of a belligerent party, doubtlessly appertains to the rights of a neutral state. If experience shows that an embargo of any character whatsoever becomes necessary for this purpose during the course of a war, this Power is justified in changing its previous neutrality practice.

On the other hand, the present case, which differs so completely from

all former cases, represents a "*fait nouveau*," which as already intimated, does not fall under the cited Article 7 and therefore can not be regarded otherwise than "an unforeseen case," which, in the sense of the preamble to the thirteenth convention (Par. 3) must be dealt with according to the general principles of international law, as has been set forth above.

Nor did the suggestion made by the Imperial and Royal Government with respect to the importation of foodstuffs and raw materials proceed from the idea that a neutral Government is bound to compensate for the advantages attained by one belligerent party over another by a system of non-intercourse with the former. As may be seen from the note of June 29 of this year, the aforesaid suggestion had merely the purpose of representing to the Washington Cabinet, which had presented the argument that, in consequence of the war situation, it was impossible for the United States to carry on commerce with the Central Powers, that it lay within the power of the Government of the Union to open up the possibility of doing so. In fact it is not the maritime successes of Great Britain and her allies which caused the cessation of trade between America and Austria-Hungary, at least as far as non-contraband goods are concerned, but the illegal measures adopted by the Entente Powers, which, as is not unknown to the Imperial and Royal Government, are also regarded as illegal by the Government of the Union.

The Imperial and Royal Government do not indeed deny that, if the Washington Cabinet should accommodate themselves to the Austro-Hungarian view, the position of the United States of America toward the two belligerent parties in the domain of commerce would be less unequal than is at present the case. But it appears to the Imperial and Royal Government that an argument against a suggestion which is perhaps otherwise recognized by a neutral Power as justifiable from a standpoint of neutrality is all the less to be deduced from the foregoing, since even according to the view of the Washington Cabinet, it is certainly not the task of a neutral State to shape its position as unequally as possible to the two belligerent parties or, in case such an inequality exists, not to disturb it under any circumstances.

As opposed to the assumption of the Government of the Union that, in the opinion of the Imperial and Royal Government, the exportation of arms and ammunition conflicted with the last paragraph of the preamble to the thirteenth convention, it may be emphasized that the Imperial and Royal Government based their position against the expor-

tation of war requisities, as represented above, on paragraphs 2 and 3 of the preamble. The appeal to the latter paragraph was intended to be in connection with the question of the illegitimate exclusion of Austria-Hungary from the American market and was for the purpose of showing that for this very reason the Government of the Union would be justified in issuing an embargo by legislative means.

If the Government of the United States, as it would appear, mean to express the view that the Government of a belligerent Power are not warranted in speaking in matters of the preservation or exercise of a right of a neutral state, this is perhaps to be explained by the fact that the Washington Cabinet gave a too restrictive interpretation to the last-mentioned paragraph, to the effect that this paragraph refers only to strictly personal rights, the protection of which even in the opinion of the Imperial and Royal Government must naturally be left to the discretion of the neutral state.

The aforesaid paragraph, however, as is clear from the report which the French delegate, M. Renault, made to the Committee of the Whole at the Hague Conference upon the thirteenth convention (Second International Peace Conference, Acts and Documents, Volume 1, page 326) has in view the case of the observance of neutrality, and therefore the privilege of approaching a neutral government with appeal to the said passage can not be denied to a belligerent, in case the question of the protection of the rights of a neutral state touches upon the sphere of rights of the belligerent.

The Imperial and Royal Government have followed with keen interest the representations of the Government of the Union, wherein the points of view which make it imperative for the Washington Cabinet to place no restrictions upon the exportation of war material during the present war are set forth; however, they do not abandon the hope of meeting the approval of the Government of the Union in remarking that these points of view of a purely practical nature do not influence the legal aspect of the case, and it must remain uninvestigated by us whether the fact that the manufacturer of requisites of war in the United States could assume such large dimensions would not rather justify the conclusion that the United States, where all requisites for this production, *viz*, manual labor, natural resources, and capital exist in abundance, would not be dependent upon drawing war material from abroad, in case it should have to conduct a war of its own, in which their own cause would increase the energy of its citizens.

The Imperial and Royal Government particularly beg to add the following:

In citing the precedents appealed to by the Washington Cabinet, which, as already mentioned, can not, however, be recognized as such, the Government of the Union emphasize the example of the Boer War, during which a commercial isolation of one of the belligerent parties analogous to that in the present war occurred. In truth such an analogy can scarcely be recognized, because at that time Great Britain had not proclaimed a prohibition of trade, such as that presented by the present illegal measures of the London Cabinet, and because a commercial isolation certainly can not be seen in the prevention of the importation of arms and ammunitions, as mentioned by the Government of the Union, to say nothing of the fact that the exportation of war material from Austria-Hungary in the Boer War, just as in other wars in which such exportation took place at all, the bounds of reasonableness were never overstepped.

As to the reference of the Washington Cabinet to the German authority, the ground has been cut from under it and the conclusions derived therefrom by the fact that, as in the meantime must have become known to the Government of the Union, Mr. Einicke has publicly protested against the use of a passage of his treatise on neutrality in maritime warfare in support of the attitude of the Washington Cabinet. Moreover, the Imperial and Royal Government regard it as a matter of course that a neutral state must not proclaim an embargo with the intention of injuring one of the belligerent parties. It is equally a matter of course that it can never be asserted of an embargo which a state has proclaimed for the maintenance of its neutrality that this was done with a view of injuring one of the belligerent parties.

Finally, the observations of the Government of the Union dealing with the provisioning of vessels of war are apparently based upon a misunderstanding. In mentioning the prohibition of the delivery of vessels of war and the prohibition of certain deliveries to vessels of war the Imperial and Royal Government had no concrete case in view, but rather the prohibition expressed in Articles 8, 19, and 20 of the Thirteenth Hague Convention.

The undersigned has the honor to appeal to the kindness of His Excellency the American Ambassador with the most respectful request that he be good enough to communicate to the Washington Cabinet by telegraph the foregoing friendly arguments, which are merely intended

as a final supplement to the statement of the legal aspect of the matter as defined in the note of June 29 of this year with regard to the points set forth by the Government of the Union, and at the same time the undersigned avails himself, etc.

BURIAN.